

April 23, 2015

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Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: MUR 6916

Dear Mr. Jordan:

We write as counsel to the Democratic National Committee ("DNC") and Andrew Tobias in his official capacity as Treasurer ("Respondents"), in response to the complaint filed by the Foundation for Accountability and Civic Trust on February 16 (the "Complaint"). The Complaint fails to set forth sufficient facts, which, if proven true, would constitute a violation of the Federal Election Campaign Act of 1971, as amended ("the Act") or Commission rules, and the few facts it does allege are irrelevant or are refuted by the public record. Accordingly, the Complaint should be dismissed and the Commission should close the file.

Legal Analysis

"The Commission may find reason to believe only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the [Act]."¹ Additionally, "unwarranted legal conclusions from asserted facts" and mere speculation will not be accepted as true.²

The Complaint makes three allegations: first, that Catalyst, LLC ("Catalist") made improper in-kind contributions to Respondents by charging them less than the normal and usual charge for its services; second, that Catalyst served as a common vendor to Respondents and certain unidentified outside groups in violation of the coordination rules; and, third, that Catalyst was established, financed, maintained or controlled by Respondents. All three allegations fail to meet this standard and, therefore, must be dismissed.

I. Respondents Paid the Normal and Usual Charge for the Services Rendered

The Complaint alleges that Catalyst made in-kind contributions to Respondents by charging them less than the normal and usual charge for its services. This claim is purely speculative and

¹ Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas, MUR 4960 (Dec. 21, 2000).

² *Id.*

without basis. The DNC retained Catalist in 2010 to perform data services.³ As with the DNC's other business dealings, the terms of the DNC's agreement with Catalist was negotiated at arm's length between the parties, and the DNC paid Catalist \$60,000 for the services rendered. The size of these fees is flatly inconsistent with a supposed "little interest in making a profit."⁴

In any case, the Complaint alleges no information to show that the DNC was undercharged. It fails to present any gap between what a similarly situated consumer would have paid, and what the DNC actually paid.⁵ Rather, it relies entirely on two "blind" quotes from a book that assert conclusorily that Catalist "has little interest in profits" and was "more interested in keeping its prices down to help partisan and ideological allies."⁶ This kind of hearsay -- "citing an unidentified source's statement that itself lacks any indicia of reliability -- is not adequate support for a finding of reason to believe that the Act has been violated."⁷ In any case, the only test is whether Catalist actually charged its clients the normal and usual charge—a matter on which the Complaint is entirely silent.

II. Respondents Did Not Receive In-Kind Contributions in the Form of Coordinated Communications

The Complaint also alleges that Catalist served as a "common vendor" that made available Respondents' "client lists and voter data files" to unspecified outside groups. Accordingly, the Complaint alleges, these unspecified outside groups may have made unspecified coordinated communications that should have been treated as in-kind contributions to Respondents.

Under Commission rules, to constitute a "coordinated communication," a public communication must meet three prongs. First, it must be paid for by a person other than the candidate, authorized committee or political party committee with which it is coordinated. Second, it must satisfy one or more content standards. Third, it must satisfy one of several conduct standards.⁸

The Complaint fails to allege specific facts to support a finding that any one of these prongs has been met. It does not point to a single specific communication that was paid for by a third party group. Nor does it identify the content of any such communication, or even when such a communication may have been distributed.

³ The Complaint fails to specify when, precisely, the violations alleged therein would have occurred. As claims accruing more than five years ago are barred by the statute of limitations, this response only addresses activity that occurred from 2010 to the present. 28 U.S.C. § 2462.

⁴ Complaint at 24. The DNC also retained NGP VAN, LLC, but the Complaint does not allege that NGP VAN provided services at less than the normal and usual cost, nor does it provide any facts that would support such a contention. See *id.* at 24-25.

⁵ See 11 C.F.R. § 100.52(d)(2).

⁶ Complaint at 20.

⁷ First General Counsel's Report, MUR 6506, at 5 (Feb. 15, 2013).

⁸ 11 C.F.R. § 109.21(a).

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Moreover, there is no factual or legal basis to find that the conduct prong was met. The Complaint asserts that Catalist served as a "common vendor" to both Respondents and outside groups. But merely sharing the same vendor is not a violation of the Act, nor does it create a presumption of coordination.⁹ Instead, a vendor is a "common vendor" under the rules only if the vendor's "usual and normal business includes the creation, production, or distribution of communications"¹⁰ and "the same vendor creates or distributes the ad alleged to be coordinated and, within 120 days, has provided specified services for the candidate alleged to have benefitted from the coordination."¹¹ Furthermore, the vendor must have used material nonpublic information about the candidate or party committee's plans, projects, activities or needs, or information used previously in providing services to the candidate or party committee, in creating, producing or distributing the ad, or conveyed such information to the person paying for the communication.¹²

According to its own website, Catalist does not appear to create or distribute communications in the normal course of its business,¹³ and the Complaint does not allege anything to the contrary.¹⁴ Moreover, the DNC took the same steps with Catalist as it does with its other vendors to ensure that its nonpublic information was kept confidential and not used by Catalist in its work with its other clients. Thus, there is no basis to find that Catalist served as a "common vendor" under the rules or that Catalist improperly used or shared DNC information.¹⁵

The complaint also makes the vague and unsourced allegation that Catalist and NGP VAN have "joined forces," leading to the sharing of information in violation of the coordination rules.¹⁶ But it still fails to allege any specific facts with respect to NGP VAN that would trigger the conduct prong of the coordination rules. As described above, merely acting as a common vendor is not a violation of the Act or serve as prima facie evidence of coordination. The Complaint

⁹ See *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 436 (Jan. 3, 2003).

¹⁰ *Id.* at 436.

¹¹ First General Counsel's Report, MUR 6077, at 7 (Apr. 20, 2009); 11 C.F.R. § 109.21(d)(4).

¹² See 11 C.F.R. § 109.21(d)(4)(iii).

¹³ See Catalist, Products, www.catalist.us/product/product.html (failing to identify communication production, creation or distribution services as among its products).

¹⁴ MUR 6077, at 8.

¹⁵ See, e.g., First General Counsel's Report, MUR 6570 (Oct. 22, 2012) (declining to pursue enforcement where there were no "allegations of specific conduct" that a common vendor used or conveyed nonpublic campaign information). The only "fact" that the Complaint cites to support its "common vendor" argument is an unsourced statement in *The Victory Lab* that, over seven years ago, a different committee was able to access voter registration information that had been collected by an outside group before the voter's application had been officially processed. Complaint at 22. This type of unsourced hearsay is inadequate to support a finding of reason to believe. First General Counsel's Report, MUR 6506, at 5. And even if it were, it shows no transfer of nonpublic information from a campaign or party committee to an outside group, but rather the reverse, which satisfies none of the conduct standards under the coordination rules. See 11 C.F.R. § 109.21(d).

¹⁶ Complaint at 26.

fails to allege any specific facts that show that NGP VAN created or distributed communications for outside groups, that show the actual transfer of information from Respondents to those outside groups, or that show that such information was material to any communication made by an outside group. Without such facts, the Commission may not find reason to believe.¹⁷

Lastly, even if the Complaint alleged that Catalist or NGP VAN used or conveyed Respondents' nonpublic information, the Complaint still would not allege a violation by Respondents. Under the rules, if a common vendor uses such information to create, produce, or disseminate a communication paid for by a third party, or conveys such information to the third party, the third party will have *made* an in-kind contribution in the form of a coordinated communication.¹⁸ But the campaign or party committee does not *receive* an in-kind contribution unless it requests or suggests that the third party make the communication, is materially involved in decisions regarding the communication, or has substantial discussions with the third party in which it disclosed nonpublic and material information about its plans, projects, activities or needs.¹⁹ And there is no basis to conclude that any of these other conduct standards have been met.

III. Respondents Did Not Establish, Finance, Maintain, Maintain or Control Catalist

Finally, the Complaint alleges that Respondents may have established, financed, maintained or controlled Catalist and, accordingly, that Catalist is subject to the national party soft money ban.²⁰ This allegation is also baseless.

In determining whether an entity is directly or indirectly established, financed, maintained, or controlled by a national party committee, the Commission will examine several factors in the context of the overall relationship between the party committee and the entity, including:

- Whether the party committee, directly or through its agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;
- Whether the party committee, directly or through its agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity;
- Whether the party committee has a common or overlapping membership, or common or overlapping officers or employees, with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;

¹⁷ See First General Counsel's Report, MUR 6570; First General Counsel's Report, MUR 6077, at 7.

¹⁸ 11 C.F.R. §§ 109.21(c)(4).

¹⁹ *Id.* §§ 109.21(b)(2), 109.37(a)(3).

²⁰ Complaint at 27.

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- Whether the party committee has any members, officers, or employees who were members, officers or employees of the entity that indicates a formal or ongoing relationship between the sponsor and the entity, or that indicates the creation of a successor entity;
- Whether the party committee, directly or through its agent, provides funds or goods in a significant amount or on an ongoing basis to the entity or arranges for funds in a significant amount to be provided to the entity; and
- Whether the party committee, directly or through its agent, had an active or significant role in the formation of the entity.²¹

A review of these factors shows that the DNC did not establish, finance, maintain, or control Catalist. The DNC was not authorized to play an active or significant role in Catalist's formation.²² The DNC has no formal authority to direct or participate in Catalist's governance or to control Catalist's officers and employees.²³ And the DNC has not made or authorized any payments to Catalist, other than those it has made, at the normal and usual charge, for services rendered.²⁴

The sole basis for the Complaint's contention that Respondents may have established, financed, maintained or controlled Catalist is the fact that Harold Ickes, a member of the DNC and the DNC's Rules and Bylaws Committee, also founded Catalist and currently serves as its President. Mr. Ickes is one of 451 members of the DNC and is one of 30 members of the DNC's Rules and Bylaws Committee, and his involvement with Catalist was not authorized by the DNC.²⁵ Such *de minimis* overlap in membership is insufficient to find that Respondents "control" Catalist. In applying the affiliation rules, which follow the same analysis,²⁶ the Commission has found that where one entity controls a single seat on a second entity's board, such a relationship alone is insufficient to establish the type of control necessary to find affiliation.²⁷ A fortiori, there can be no establishment, financing, maintenance or control where, as here, the DNC and Catalist share only a single common member or officer and the DNC has not authorized, and does not control, Mr. Ickes' private, outside involvement with Catalist.

²¹ 11 C.F.R. § 300.2(c).

²² See Declaration of Brad Marshall, ¶ 3.

²³ *Id.*

²⁴ *Id.*

²⁵ See *id.*

²⁶ See *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money; Final Rule*, 67 Fed. Reg. 49,084 (July 29, 2002).

²⁷ See Advisory Opinions 2012-21, 2002-12.

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Conclusion

The Complaint fails to allege specific facts that constitute a violation of the Act or Commission regulations. For the reasons described herein, we respectfully request that the Commission promptly dismiss this matter and take no further action.

Very truly yours,



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Counsel to Respondents

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